No. 10992

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONTRACTORS, PACIFIC NAVAL AIR BASES, an Association, and LIBERTY MUTUAL INSURANCE COMPANY, a Corporation,

Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner of the United States Employees' Compensation Commission for the 14th Compensation District, and TEX HADDON,

Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR APPELLEES

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United States Attorney.

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1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

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BRIEF FOR APPELLEES

STATEMENT OF THE CASE

This is an appeal from an order of the District Court for the Western District of Washington, Northern Division, Honorable John C. Bowen, District Judge, dismissing the petition of Contractors, PNAB, for a mandatory injunction and to set aside the compensation order filed June 5, 1944, by Deputy Commissioner William A. Marshall, one of the appellees herein, by which he awarded compensation to Tex M. Haddon for disabilities resulting from injuries sustained in June 1942, while employed by Contrac-

tors, PNAB, in the Territory of Hawaii. The other appellant, Liberty Mutual Insurance Company, was the insurance carrier of the compensation liability of Contractors, PNAB, hereinafter called the employer. The compensation order was issued pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424 (33 U.S.C. 901 *et seq.*), as made applicable to persons employed at certain defense base areas and other places by the Act of August 16, 1941, 55 Stat. 622 (42 U.S.C. 1651-1654).

In June 1942, Haddon, while employed as a plumber and while attempting with other employees to place a long heavy pipe in an erect position, strained his back. He immediately reported the injury to his foreman, who in turn told the general foreman and the latter ordered that claimant be assigned to lighter work. Until his return to the United States in December 1942, Haddon did lighter work involving no lifting. But during all the time his back continued to trouble him although he continued to work.

After his return to the United States, Haddon's back still continued to trouble him and he consulted a Dr. White. The latter wrote to the employer on April 1, 1943, enclosing X-ray records of Haddon's back. The employer referred the letter to the Nichols

Adjustment Bureau, the insurance company's representative, who acknowledged it on April 7, 1943, and stated that it would advise the doctor with reference to treatments and the status of the claim as soon as it heard from the insurance company. On May 29, 1943, the Nichols Adjustment Bureau stated that it had been instructed to the effect that Haddon be given a thorough examination and asking if he could come to Boise, Idaho. Haddon went to Boise and entered a hospital for examination, where he remained about a week. Later, in September 1943, at the request of the Nichols Adjustment Bureau, Haddon went to San Francisco for further examination.

On July 23, 1943, the employer filed a report of injury with the deputy commissioner pursuant to section 30 of the Act (33 U.S.C. 930), and on September 3, 1943, Haddon filed his claim for compensation. The employer and carrier controverted the claim upon the grounds that Haddon (1) failed to give notice of injury within 30 days as required by section 12 of the Act; (2) failed to file his claim within one year after the injury as required by section 13 of the Act; and (3) did not sustain any injuries as alleged, or resulting disabilities therefrom (R. 14). Hearings were held before the deputy commissioner on December 29, 1943, and February 8, 1944, at

which both sides offered evidence with respect to the issues controverted. Upon the evidence adduced before him, the deputy commissioner, on June 5, 1944, issued the compensation order complained of (R. 8), whereby he awarded compensation to Haddon.

The employer and carrier thereupon instituted proceedings in the court below to review the compensation order pursuant to the provisions of section 21 (b) of the Longshoremen's Act (33 U.S.C. 921 (b)). The complaint filed (R. 2-7) did not raise the issues whether Haddon failed to give notice, and file his claim within the time prescribed by the Act, nor the issue whether Haddon sustained injuries as he alleged. The complaint asserted only two grounds (Para. VIII, R. 5): (1) that there was no substantial evidence to support the finding that "because of said injury claimant was wholly disabled, and that such disability continued at the time of the hearing held on February 8, 1944"; and (2) that there was no substantial evidence to support the finding as to the amount of Haddon's earnings.

A motion to dismiss the complaint was filed on behalf of the deputy commissioner. The case came on for hearing before the District Judge, who by an order entered October 16, 1944, granted the motion

and dismissed the complaint. The present appeal by the employer and its insurance carrier was accordingly taken.

APPELLANTS' CONTENTION

In the present case the evidence is uncontradicted that the employee sustained an injury to his back while working and was immediately given lighter work, and that from that time he suffered continuous pain and discomfort in his back and legs; that the pain in his back is at the particular spot where he felt the snap in his back at the time of the injury. His fellow employees and superiors testified that the employee was a good worker and in full vitality before the injury and that after the injury he continually complained of his back and legs and would retire to his bunk after work, following his evening meal.

Appellants appear to contend, however, that in order to support an award for disability, opinion by a medical expert must be positive that the disability for which the award is made is causally related to the injury sustained (Appellants' Br. 14 and 25). Appellants apparently concede that causal relationship may sometimes be established by "other evidence", but deny that in the instant case such "other

evidence" is sufficient (Appellants' Br. 19). This contention disregards the evidence of the employee, Haddon, and of his fellow employees and superiors who testified to the injury and its immediate and continued effects. Appellants urge that the only "other evidence" which may be relied upon to support a finding of causal relationship must be such as "to indicate to the *lay mind* that the only fair inference to be drawn was that the alleged accident in May or June 1942, proximately contributed to the disability" (Appellants' Br. 27). Appellants cite no authority which so holds and we know of none. On the contrary, it has been repeatedly held that where the evidence permits of conflicting inferences, the inference drawn by the deputy commissioner is not subject to review and will not be reweighed by the courts. Finally, Appellants deny the established rule in Longshoremen's cases that medical opinion may be disregarded.

ARGUMENT

I

THE FINDING OF THE DEPUTY COMMISSIONER THAT CLAIMANT WAS DISABLED AS THE RESULT OF HIS INJURY IS SUPPORTED BY EVIDENCE, AND BEING THUS SUPPORTED IS FINAL AND CONCLUSIVE.

A. The Principles of Law Support the Deputy Commissioner's Action

Appellants' contention comes in substance to this assertion: that once conflict of medical testimony is involved, the courts may review the inferences drawn by the deputy commissioner from the evidence and, unless the inferences he has drawn are in the court's opinion "the only fair inferences" (Appellant's Br. 27), may reweigh the evidence and substitute its own views for those of the deputy commissioner. This is, however, precisely what the decided cases have held the courts may not do.

The Longshoremen's Act should be liberally construed in favor of the injured employee or his dependent family.[1] It provides as to any claim thereunder

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[1] *Baltimore & Philadelphia Steamboat Co. v. Norton, deputy commissioner*, 284 U.S. 408 (1932); *Fidelity & Casualty Co. v. Burris*, 59 F. (2d) 1042 (App. D.C. 1932); *Associated General Contractors*

(33 U.S.C. 920), that "it shall be presumed, in the absence of substantial evidence to the contrary" that such claim comes within the statute. The rights, remedies and procedure under the Act are governed exclusively by that statute.[2] The findings of fact of the deputy commissioner are presumed to be correct.[3] If such findings of fact are supported by evidence

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v. Cardillo, deputy commissioner, 106 F. (2d) 327 (App. D.C. 1939); *DeWald v. Baltimore & Ohio R. R. Co.,* 71 F. (2d) 810 (C.C.A. 4, 1934), cert. den. 293 U.S. 581.

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[2] *Associated Indemnity Corp. v. Marshall, deputy commissioner,* 71 F. (2d) 235 (C.C.A. 9, 1934); *Shugard v. Hoage, deputy commissioner,* 89 F. (2d) 796 (App. D.C. 1937); *Luyk v. Hertel,* 242 Mich. 445, 219 N.W. 721 (1928); *Texas Indemnity Ins. Co. v. Pemberton,* 9 S.W. (2d) 65 (Tex. 1928); *Nierman v. Industrial Comm.,* 329 Ill. 623, 161 N. E. 115 (1928); *Town of Albion v. Industrial Commission,* 202 Wis. 15, 231 N.W. 249 (1930). Compare *Bassett, deputy commissioner v. Massman Construction Company,* 120 F. (2d) 230 (C.C.A. 8, 1941), cert. den. 314 U.S. 648.

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[3] *Anderson v. Hoage, deputy commissioner,* 70 F. (2d) 773 (App. D.C. 1934); *Luckenbach Steamship Co. v. Norton, deputy commissioner,* 96 F. (2d) 764 (C.C.A. 3, 1938); *Burley Welding Works, Inc. v. Lawson, deputy commissioner,* 141 F. (2d) 964 (C.C.A. 5, 1944).

they should be regarded as final and conclusive and not subject to judicial review.[4]

Deductions and inferences which may be and are drawn by the deputy commissioner from the evidence are the equivalent of established facts and are not judicially reviewable.[5] Even if the evidence permits conflicting inferences, the inference drawn by the

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[4] *Marshall, deputy commissioner v. Pletz*, 317 U.S. 383 (1943); *South Chicago Coal & Dock Co. v. Bassett, deputy commissioner*, 309 U.S. 251 (1940); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America*, 288 U.S. 162 (1933); *Jules C. L'Hote v. Crowell, deputy commissioner*, 286 U.S. 528 (1932); *Parker, deputy commissioner v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941); See 71 C. J. 1297, Sec. 1268.

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[5] *Liberty Mutual Insurance Co. v. Gray, deputy commissioner*, 137 F. (2d) 926 (C.C.A. 9, 1943); *Michigan Transit Corporation v. Brown, deputy commissioner*, 56 F. (2d) 200 (D.C. Mich. 1929); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Eastern Steamship Lines, Inc. v. Monahan, deputy commissioner*, 21 F. Supp. 535 (D.C. Me. 1937); *Grain Handling Co., Inc. v. McManigal, deputy commissioner*, 23 F. Supp. 748 (W.D.N.Y. 1938); *Simmons v. Marshall, deputy commissioner*, 94 F. (2d) 850 (C.C.A. 9, 1938); *Lowe, deputy commissioner v. Central R. R. Co.*, 113 F. (2d) 413 (C.C.A. 3, 1940); *Parker, deputy commissioner v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941).

deputy commissioner is not subject to review and will not be reweighed.[6]

As this court recently stated in the similar case of *Contractors, PNAB, v. Pillsbury, deputy commissioner*, ... F. (2d) ..... (C.C.A. 9, No. 10,950, decided June 22, 1945):

> "There was evidence covering material facts before the Deputy Commissioner which would support the order of award. Logical deductions and inferences which may be and are drawn by him from the evidence should be taken as established facts and are not judicially reviewable. *Liberty Mutual Insurance Co. v. Gray*, 137 F. (2d) 926 (C.C.A. 9); *Simmons v. Marshall*, 94 F. (2d) 850 (C.C.A. 9); *Crowell v. Benson*, 285 U.S. 22, 46; *Parker v. Motor Boat Sales*, 314 U.S. 244, 246. Even if the evidence permits conflicting inferences, the inference drawn by the Deputy Commissioner is not subject to review and will not be reweighed. *Liberty Mutual Ins. Co. v. Gray, supra; South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 260, 261; *Norton v. Warner Co.* 321 U.S. 565, 566. The Deputy Commissioner is not bound to accept the opinion or theory of any particular medical expert but he

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[6] *South Chicago Coal & Dock Co. v. Bassett, deputy commissioner*, 309 U.S. 251 (1940); *Parker, deputy commissioner v. Motor Boat Sales Inc.*, 314 U.S. 244 (1941); *Liberty Mutual Insurance Co. v. Gray, deputy commissioner*, 137 F. (2d) 926 (C.C.A. 9, 1943); *Lowe, deputy commissioner, v. Central R.R. Co.*, 113 F. (2d) 413 (C.C.A. 3, 1940); *Henderson, deputy commissioner, v. Pate Stevedoring Co., Inc.*, 134 F. (2d) 440 (C.C.A. 5, 1943).

may rely upon his own observation and judgment in conjunction with all of the evidence before him. *Zurich Gen. Accident Co. v. Marshall*, 42 F. (2d) 1010; *Liberty Mutual Ins. Co. v. Marshall*, 57 F. Supp. 177-178."[7]

It is solely within the province of the deputy

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[7] In the case at bar moreover, the experts were divided. While the physicians employed by appellants thought the injury could not cause the disability, the expert appointed by the deputy commissioner was of a contrary opinion. The courts have uniformly held that the deputy commissioner is not bound to accept the opinion or theory of any particular medical examiner. Even in the absence of a difference in medical opinion he may rely upon his own observation and judgment in conjunction with the evidence: *Liberty Stevedoring Co. v. Cardillo, deputy commissioner*, 18 F. Supp. 729 (E.D., N.Y. 1937); *Joyce v. United States Deputy Commissioner*, 33 F. (2d) 218 (D.C. Me., 1929); *Jarka Corp. v. Norton, deputy commissioner*, 56 F. (2d) 287 (E.D. Pa., 1930); *Booth v. Monahan, deputy commissioner*, 56 F. (2d) 168 (D.C. Me., 1930); *Zurich Gen. Accident Co. v. Marshall, deputy commissioner*, 42 F. (2d) 1010 (W.D. Wash., 1930); *Baltimore & Ohio R.R. Co. v. Clark, deputy commissioner*, 56 F. (2d) 212 (D.C. Md., 1932); *Ryan Stevedoring Co. v. Norton, deputy commissioner*, 50 F. Supp. 221 (E.D. Pa., 1943); *Liberty Mutual Ins. Co. v. Marshall, deputy commissioner*, 57 F. Supp. 177 (W.D. Wash., 1944). Cf. *Southern Steamship Co. v. Norton, deputy commissioner*, 41 F. Supp. 108 (E.D. Pa., 1941), aff'd. 128 F. (2d) 263 (C.C.A. 3, 1942); *McNeelly v. Sheppeard, deputy commissioner*, 89 F. (2d) 956 (C.C.A. 5, 1937); *Frank Marra Co. v. Norton, deputy commissioner*, 56 F. (2d) 246 (E.D. Pa. 1931); *Independent Pier Co. v. Norton, deputy commissioner*, 54 F. (2d) 734 (C.C.A. 3, 1931).

commissioner or compensation administrator to determine the credibility of witnesses, and he may accept and believe all or any part of the testimony according to his own sound judgment of its truthfulness and reliability. *Wilson & Co., Inc. v. Locke, deputy commissioner*, 50 F. (2d) 81 (C.C.A. 2, 1931). Cf. *Rakowski's Case*, 173 N.E. 521, 273 Mass., 363 (1930); *Benjamin v. Rosenberg Bros.*, 167 N.Y.S. 650 (1917), aff'd. 223 N.Y. 569. And, notwithstanding sharp conflict in the evidence, the injured employee's testimony alone is sufficient to sustain an award in his favor. *Independent Pier Co. v. Norton, deputy commissioner*, 54 F. (2d) 734 (C.C.A. 3, 1931).

In considering the evidence and drawing inferences the deputy commissioner may give weight to "the common-sense of the situation". *Commercial Casualty Ins. Co. v. Hoage*, 75 F. (2d) 677, 678 (App. D.C., 1935); *Avignone Freres, Inc. v. Cardillo, deputy commissioner*, 117 F. (2d) 385 (App. D.C., 1940).

That is what the deputy commissioner may well have done in the instant case: applied "the common-sense of the situation". Where an accident results in immediate injury and disability, such as the strained back and sacroilliac injury suffered by Haddon, and the pain and disability is more or less continuous from that time on, the condition not having existed

before the accident, the causal connection between the accident and the subsequent disability of the back is fully established by evidence of such facts and circumstances and does not require support by medical opinion. *Wroten v. Woodley Petroleum Co.*, 12 La. App. 348, 124 So. 542 (1929); *Pierron v. Prudential Ins. Co.*, 65 Ohio App. 465, 30 N.E. (2d) 563, 567 (1942). In *Jarka Corp. v. Norton, deputy commissioner*, 56 F. (2d) 287 (E.D. Pa., 1930), the court said:

> "* * * I am unwilling to hold that a claimant in order to establish a case for compensation,must produce expert medical testimony to substantiate his claim, where it is proved that he sustained a fracture of the back and is now unable to work, and where the disability, not having existed before the injury, has been more or less *continuous since the injury.* I am also unwilling to hold that the commissioner is bound to accept the opinion of a medical expert for a respondent merely because uncontradicted. It seems to me that to sustain his contention that the award is not in accordance with law would require the court to adopt either of the foregoing rules." (Italics supplied)

Appellants (their Br. p. 21) attempt to distinguish this case by stating that in the *Jarka* case "the injury was of a traumatic nature, produced by a falling object". Appellants certainly can not seriously maintain that an employee's back must be fractured

or that the injury must occur by a falling object or both to render it a *traumatic* injury. Any bodily injury or wound, as distinguished from disease, is traumatic. Moreover, the Longshoremen's Act in its definition of injury (sec. 2(2), 33 U.S.C. 902(2)) does not restrict compensability to traumatic injuries. Other cases holding to the same effect as the *Jarka* case are: *Dinoni v. Vulcan Coal Co.*, 132 Kans. 810, 297 Pac. 721 (1931); *Utah Delaware Min. Co. v. Industrial Commission*, 76 Utah 187, 289 P. 94 (1930). In the *Utah* case, *supra*, the Court said:

> "Notwithstanding the opinion expressed by the attending physician — it was but an opinion — that he saw no connection between the present disabilities of the applicant and the injuries sustained by him at the time of the accident, nevertheless the commission had before it sufficient evidence to justify a finding that the disabilities were attributable to the accident. The nature and extent of the injuries occasioned by the accident and the parts of the body injured and affected, and the physical condition of the applicant thereafter from the time of the accident until the hearing, were all fully described and laid before the commission. Whether the present disabilities were or were not attributable to the injuries received at the time of the accident, constituted the ultimate fact or question to be determined by the commission. They were not bound to accept a mere opinion of an expert on such an ultimate question, unless such was the only reasonable conclusion to reach in the premises. * * * The applicant, prior to the accident,

having been healthy and able-bodied and having no prior kidney or bladder trouble and no sickness of any kind, and receiving a rather severe injury in the region of the kidney, together with evidence that he thereafter almost continually suffered and complained of pain in that region, and not anything to show that the diseased and infectious conditions were attributable to another cause, the natural cause to which they may be attributable is the injury received at the time of the accident. We thus think the evidence sufficient to support the findings in such respect."

In the *Dinoni* case, *supra*, the Court said:

"When all the facts and circumstances of an injury, its treatment, changes, and results, are before the compensation commissioner, and later before the district court; and also the opinion of a physician, *the latter can not be said to be the undisputed evidence in the case, if the facts and circumstances reasonably tend to show or indicate a different conclusion from that expressed in his opinion.*" (Italics supplied)

Even in those cases where there was no medical evidence of causal relationship but there was *other evidence* thereof, the federal courts have uniformly sustained an award of compensation. In *Southern Steamship Co. v. Norton, deputy commissioner*, 41 F. Supp. 108, (E.D. Pa., 1941), the court said:

"The medical testimony was no stronger in the Di Giorgio case than in the case at bar. There, as here, no physician positively established a causal relation between the accident and the injury; *nor was there any medical testimony even that the accident probably caused the injury.*

> One physician said it was a doubtful case: the physicians in general could not conclude definitely that the accident was the cause of the cataractous condition. Obviously, the Deputy Commissioner in the Di Giorgio case reached his conclusions that the injury and the cataractous condition did result from the accident from other and nonmedical testimony in the case.
>
> "I reach the same conclusions in the instant case, to-wit, that the absence of medical testimony definitely or positively establishing a causal relation between the accident and the loss of vision does not rob the findings and award of the Deputy Commissioner of validity, provided there is any other testimony to support them. That other testimony is furnished by the employee himself, including the testimony that his vision, good before the accident, was impaired thereafter." (Italics supplied)

In *Frank Marra Co. v. Norton, deputy commissioner*, 56 F. (2d) 246 (E.D. Pa., 1931), the court said:

> "The further proposition which bears the brunt of the argument is to the effect that the cause of a death is within the peculiar province of expert opinion and that a finding must have as one of its supports the testimony of an expert. It is urged that the finding of the cause of death in this case is without such support, inasmuch as the expert testimony was not that the death was due to injuries received in the course of employment, but merely that it might have been so due. In this view, the death may have resulted from any one or two or more causes, one of which was traumatic. If the testimony of the experts were all the evidence in support of the fact finding

made, it is clear that it would give equal support to any one of several different findings. There was, however, other evidence. An acceptance of the argument, addressed to us would closely approach the proposition that no finding of a cause of death can be made which does not have the support of expert opinion. This latter proposition we cannot accept. Whenever opinion evidence is admissible, the opinion of an expert is evidence, but it is in itself nothing more. It may be convincing or unconvincing. It may in itself be all sufficient to support a finding, but it does not follow that a finding may not be made without it. To hold otherwise would be to rule in effect that it is not for the fact finding tribunal, but for the experts, to find the cause of death."

In *Ryan Stevedoring Co. v. Norton, deputy commissioner,* 50 F. Supp. 221 (E.D. Pa., 1943), the court said:

"While it is true that the sole medical testimony in the case shows no causal connection between the accident and the disability for which the challenged award of compensation was made, it has been held that such causal connection need not be established by medical testimony, but that the Deputy Commissioner may rely upon his own observation and judgment in conjunction with the evidence. *Southern Steamship Co. v. Norton,* 41 F. Supp. 108, affirmed 128 F. (2d) 263, C.C.A. 3; *Frank Marra Co. v. Norton,* 56 F. (2d) 246. It has further been held that the Deputy Commissioner is not bound by the uncontradicted testimony of medical witnesses where other evidence warrants a different conclusion. *Wood Preserving Corp. v. McManigal,* 39 F. Supp. 177; *Jarka Corp. of Philadelphia v. Norton,* 56 F. (2d) 267."

The decisions under the Longshoremen's Act to the effect that the trier of the facts may rely upon evidence of the facts and circumstances in determining whether the employee is disabled and whether such disability results from the injury accord with the decisions of the state courts under the various compensation laws. See *Liberty Mutual Insurance Company v. Williams*, 44 Ga. App. 452, 161 S.E. 853 (1932); *Kempa v. Pittsburgh Terminal Coal Corporation*, 133 Pa. Super. 392, 3 A. (2d) 34 (1938), where the court said:

> "The connection between the injury, which resulted from a fall of coal that buried claimant to his waist, and the disability which followed was not remote but so direct and natural that an award does not depend solely on the testimony of the professional witnesses; essential facts to support it were established by other competent evidence." (Citing cases)
>
> "Taking into consideration all the testimony offered by claimant, we have no difficulty in reaching the conclusion that the granting of the award was fully justified * * * the fact-finding body has a right to use the conclusions and tests of ordinary every-day experience and draw the inference which reasonable men would thus draw from similar facts."[8]

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[8] Cf. *Southern Cement Co. v. Walthall*, 217 Ala. 645, 117 So. 17 (1928); *M. P. Moller Motor Car Company v. Unger*, 166 Md. 198, 170 A. 777, 780 (1934); *Pierron v. Prudential Insurance Company*, 65 Ohio

B. The Findings of Fact Are Fully Supported by Evidence.

The following is a reference to so much of the testimony taken at the hearings before the deputy commissioner as is considered sufficient to show that the findings of fact complained of are fully supported by evidence. This reference is not intended to cover all of the testimony as under the applicable decisions it is necessary only to show that there is evidence to support the findings of fact of the deputy commissioner.

Tex M. Haddon, the claimant, at the first hearing on December 29, 1943, testified in part as follows: That some time in the latter part of May or early in June 1942, while employed by this employer as a plumber at Barber's Point Camp on the Island of Oahu, and when with two other employees he was attempting to stand up a long section of heavy pipe, he felt something "snap" low down in his back; that

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App. 465, 30 N. E. (2d) 563, 567 (1941); *Provident Life and Acc. Ins. Co. v. Diehlman*, 259 Ky. 320, 82 S.W. (2d) 350, 353 (1935); *Schroeder v. Western Union Tel. Co.*, 129 S.W. (2d) 917, 921-922 (Mo. App., 1939); *De Filippo's Case*, 284 Mass. 531, 188 N.E. 245, 247 (1933); *Hartford A. and I. Co. v. Industrial Com.*, 64 Utah 176, 228 Pac. 753, 754 (1924); *Ross v. Riffle*, 210 Pa. 176, 164 Atl. 913, 915 (1932).

when this happened everything turned black for a second but he did not realize anything serious had happened; he told the two men with him, Clements and Gibbs, that he had hurt his back and he immediately sat down; he experienced a "long glimmer before his eyes like a heat wave"; he had no medical attention at the time but from then on was troubled with backache and cramping of his legs, although until December 17, 1942 (R. 15, 16) he continued to work on light work to which he had been assigned after reporting his injury to his foreman, Arthur Lukehardt.[9] Haddon also testified that immediately after the injury, Mr. Lukehardt told Haddon to take it easy and not to lift anything; that Forrest E. Williams, who was foreman and superintendent, also

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[9] An award for total disability may be proper, notwithstanding evidence indicating that an injured employee is able to perform so-called light work: *Eastern Steamship Lines, Inc., v. Monahan, deputy commissioner*, 21 F. Supp. 535 (D.C. Me., 1937); *Eastern Steamship Lines, Inc. v. Monahan, deputy* commissioner, 26 F. Supp. 944 (D.C. Me., 1939), aff'd. 110 F. (2d) 840; *Zurich Gen. Accident Co., Ltd. v. Marshall, deputy commissioner*, 56 F. (2d) 652 (W. D. Wash., 1931); *Zurich Gen. Accident Co., Ltd. v. Marshall, deputy commissioner*, 42 F. (2d) 1010 (W.D. Wash. 1930); *Liberty Mutual Casualty Ins. Co. v. Locke, deputy commissioner*, 60 F. (2d) 35 (C.C.A. 2, 1932); *Reilley v. Carroll*, 147 Atl. 818 (Conn, 1929); *Roller v. Warren*, 98 Vt. 514, 129 Atl. 168 (1925).

knew of Haddon's injury and of this light work to which Haddon had been assigned by Lukehardt as the result of Haddon's injury (R. 19, 20). Haddon further testified that because of his wife's insistence, he went to see Dr. White, who X-rayed Haddon's back some time in February 1943 and that Dr. White wrote Morrison-Knudsen Company, the employer, who took it up with the Liberty Mutual Insurance Company, the carrier (R. 17).

At the later hearing on February 8, 1944, Haddon testified that about April 8 or 10, 1943 he received in the mail a copy of a letter, dated April 6, 1943 from Morrison-Knudsen Company, the employer, addressed to the Nichols Adjustment Bureau (the insurance carrier's representative) transmitting Dr. White's letter and X-ray concerning Haddon's claim (R. 22); that Dr. White gave Haddon a letter, dated April 7, 1943 received by Dr. White from Nichols Adjustment Bureau which stated that Dr. White's letter to Morrison-Knudsen Company had been turned over to them and that they would advise the doctor and Haddon concerning the latter's treatment and the status of his claim (R. 23, 24); that pursuant to a request in a letter to Haddon from the Nichols Adjustment Bureau dated May 29, 1943, he went, as directed, to a hospital for an examination of his in-

jury; that he remained there about a week (R. 25, 26); that pursuant to further requests in two other letters from the Nichols Adjustment Bureau, dated July 12, 1943, and September 3, 1943, respectively, Haddon went for further examination to a San Francisco hospital, where he spent about four days being examined by the plaintiff's doctors (R. 29-31).

Haddon further testified that at the time of his injury his contract called for wages of $225.00 per month but that the actual scale was much above that so that he actually earned from $109.00 to $120.00 per week; that he started to work there on January 22 or 23, 1942, and continued to work even after his injury in June 1942 (R. 33); that he reported his injury immediately to Mr. Lukehardt, his foreman, who within 30 minutes, put him on light work where he would do no lifting (R. 35); that prior to his injury his health had been good and his legs or back had never bothered him but that since his injury he has continually suffered from a painful back and legs so that he can hardly stand up, is unable to stay on his feet any length of time and feels as if he has been cut in two and the two sore edges come together; that he experienced that feeling from the time he was injured; that after the injury he went to bed whenever he could (R. 37, 38); that when he returned to the

states he thought he could work and got a job but got to feeling so badly he could not work (R. 39, 40); that the pain in his back is at the particular spot where he felt the snap (R. 43); that he is unable to work although there is plenty of work available.

W. A. McFayden testified in part as follows: That he was also employed as a plumber by the same employer as Haddon, the Morrison-Knudsen Company; that he never knew Haddon until they met in signing up on the job; that he roomed with Haddon on the job and saw him every day (R. 58) and prior to the injury Haddon was always "peppy and full of life" and was considered one of the hardest workers in their group of 50 or 60 men (R. 59); that Haddon told McFayden of Haddon's injury either on the day it happened or on the next night when he came in after work; that after the injury had happened, Haddon would not fool around as had been his habit but spent a lot of his time in his bunk just as soon as he left the mess hall at night; that Haddon did not go up town as was his custom before and never went to Honolulu on his days off as he used to; that he complained continually of his back and legs bothering him since his injury and used to put a jacket under his mattress to give some support to his back; that he

did the light work to which he had been assigned after his injury (R. 60, 62).

Forrest E. Williams testified as follows: That during 1942 he was employed as general plumber foreman with the Pacific Naval Air Bases and that Haddon was employed directly under his subforeman, who reported Haddon's injury to him and that Haddon was immediately given light work and kept on the job by his instructions (R. 109-111).

Dr. H. J. Wyckoff, who examined claimant on February 9, 1944 *at the direction of the deputy commissioner* (R. 71), reported in part as follows:

> "History: This man states that in June, 1942, while raising or holding some heavy pipe above his head, he felt a snapping sensation in the lower back. He said that things sort of went black for a moment and he put his hand on his back. He states that he seemed to have some disturbance of control of the legs so after reporting to the office he was put on lighter work. Following this he had severe pain in the back and sort of cramping sensations in both legs, more severe in the left. He states that soon after this he returned to the States and after arriving here he developed a rather severe cold and with this he had a severe knife like pain in the lower back.
>
> "Present Complaints: He states that at the present time the condition is somewhat improved but he still has some pain in the lower back and a feeling of tightening of the muscles in the lower extremities. He states that he has a pump-

ing sensation in the ankles, knees and hips. He states that following the original trouble the pain seemed to be referred down the left thigh and left leg as far as the foot. He also had pain which he felt was referred up in the region of the right shoulder and right upper arm.

"Past History: He states that he has never had any previous injuries and no previous back trouble. He has never had any operations.

"Examination: This man is 49 years of age. 5 feet 11 inches in height and weighs about 165 pounds. He can bend forward to within 12 inches of the floor. Backward bending is markedly limited, at least 50%, lateral bending is limited about 50%, in each direction in the lumbar region and rotation is limited about 25%, in each direction, in the lumbar region. Motion of the cervical and dorsal spine seems to be fairly free. He has good motion of the left upper extremity. He has good motion of the right elbow, wrist and fingers. The right shoulder is markedly limited, can be abducted about 60 degrees, rotation is limited about 50% in each direction, with a complaint of pain in the region of the right shoulder joint. He complains of tenderness over the lumbo-sacral region and out over the superior gluteal region on either side. There is a dulling of sensation over the outer side of the left leg and foot, sensation otherwise seems to be normal.

"The abdominal, cremasteric and patellar reflexes are equal and active, the right Achilles reflex is present, the left is entirely absent. On measurement about the calf regions, the left is ¼ inch less than the right. Measurements about the lower thigh, the left is 1 inch less than the

right, over the midthigh the left is 3/8 inch less than the right. He has intermittent spasm of the lower back muscles but does not have a fixed protective spasm of these muscles.

"The eyes appear normal, pupils reacting to light and accommodation. All of the teeth have been extracted and he is wearing upper and lower plates. The tonsils are small. Measurements about the arms and forearms are practically the same on both sides. This man is normally right handed.

"This man shows a relaxation of the right wrist, with considerable forward and backward motion at the wrist joint or through the carpal joints, which he states was due to an old injury during the last world war. He states there was no injury to the shoulder at that time as far as he knows, although there may have been an injury to the right shoulder at that time.

"X-Rays: Of the right shoulder show no definite pathology in the region of this shoulder, except possibly a slight narrowing of the joint space and some slight bone atrophy of the bones about this joint. X-Rays of the lumbosacral spine show no pathology in the lateral view, except a slight narrowing of the intervertebral space between the 4th and 5th lumbar vertebrae, in the lateral view. There seems to be a very slight lipping of the 5th lumbar vertebra.

"Conclusions: The clinical findings and history of this man's case are very typical of a displaced intervertebral disc between the 5th lumbar vertebra and the sacrum, on the left side. There is also some pathology in the region of the right shoulder which is probably in the nature of an

arthritis involving this shoulder joint. I think it is possible that the lesion which he has at the present time occurred at the time of his accident, of June, 1942. The condition of the right shoulder is probably an inflammatory condition and does not seem to be definitely connected with his injury.

"I would recommend an operation for this man's back, exploring the region between the lumbar vertebrae and the sacrum on the left side. This is a case which probably will not need to be fused but this should be determined at the time of operation." (R. 112-115)

It is believed that the evidence referred to above discloses unmistakably a situation of continuing disability from the moment the claimant first felt the "snap" in his back, when the injury occurred, until the date on which he ultimately became disabled. Under the settled law that the deputy commissioner should take a common sense view of the questions involved, especially where medical testimony conflicts, it is impossible to see how anyone reading the record could have come to any other conclusion than that the back injury caused the claimant's disability. It is accordingly submitted that the action of the deputy is fully supported by the evidence and must be sustained.

II

APPELLANTS' CLAIMS OF ERROR IN THE FINDINGS OF THE DEPUTY COMMISSIONER ARE GROUNDLESS AND DEVOID OF MERIT

A. The Objection That Claimant Did Not Sustain An Injury Is Made Too Late.

Appellants seek for the first time in this court to raise the issue that claimant's back strain and sacroilliac displacement do not constitute an injury. The only issues raised by Appellants in the court below are stated in paragraph VIII of the complaint as follows:

> "That said Compensation Order and Award of Compensation is not in accordance with law and with the provisions of said act, in this, that there was not at any time herein mentioned or at any other time, any substantial evidence before said respondent to support the finding that because of said injury, claimant was wholly disabled and that such disability continued at the time of the hearing in this matter held on February 8, 1944. That said Compensation Order and Award of Compensation is furthermore not in accordance with law and with the provisions of said act in this, that there was not at any time herein mentioned or at any other time, any substantial evidence before said respondent to support the finding that the average annual earnings of the claimant at the time of said injury amounted to the sum of $5,668.00, * * * "

Appellants on this appeal now appear to abandon

the issue regarding Haddon's earnings and wage rate, so that the only issue now properly before this Court is the cause and extent of his disability. Never until their opening brief in this Court did Appellants raise the issue that Haddon did not sustain an injury. Appellants neither raised that issue in the court below nor did they name it in their "Statement of Points on Which Appellants Intend to Rely on Appeal" (R. 132, 139), nor even in the "Specification of Errors" of their brief (p. 8), did they include as an issue the contention that an "injury" was not sustained. When Appellants attempt to include as Point II of their Argument (their Br. p. 12) that "the record fails to disclose that an 'injury' was sustained", they seek to raise an issue which is not, and can not on the record be brought before this Court.

It is a well settled rule that an issue which is raised for the first time upon appeal will not be considered by the appellate court. *Helvering v. Tex-Penn Co.*, 300 U.S. 481, 498 (1937); *Ex parte Keiyo Kamiyama*, 44 F. (2d) 503, 505 (C.C.A. 9, 1930); *Hecht v. Alfaro*, 10 F. (2d) 464, 466 (C.C.A. 9, 1926); *Kortz v. Guardian Life Insurance Co. of America*, 144 F. (2d) 676, 679 (C.C.A. 10, 1944); *Goldie v. Cox*, 130 F. (2d) 695, 715 (C.C.A. 8, 1942); *Reconstruction Finance Corp. v. Sun Lumber Co.*, 126 F.

(2d) 731, 738 (C.C.A. 4, 1942); *Ramming Real Estate Co. v. United States*, 122 F. (2d) 892, 893 (C.C.A. 8, 1941); *Atlantic Brewing Co., Inc. v. Wm. J. Brennan Grocery Co.*, 79 F. (2d) 45, 47 (C.C.A. 8, 1935). But if it were open to appellants to raise the issue at this late date still there can be no doubt that a "snap" or "darting pain" in the back while undergoing strenuous exertion in lifting followed by weakness and growing incapacity is plainly an injury. A case substantially on all fours is *Jarvis' Case*, 274 Mass. 305, 174 N.E. 484 (1931). Cf. *Magazine v. Shull*, 60 N.E. (2d) 611 (Ind. App., 1945); *Commercial Casualty Ins. Co. v. Hoage, deputy commissioner*, 75 F. (2d) 677, 678 (App. D.C., 1935), cert. den. 295 U.S. 733.

B. Appellants' Authorities Are Inapplicable to the Case at Bar

Appellants (Br. p. 15) quote at length from an annotation in 135 A.L.R. 516. The substance of the quotation is that testimony to the effect that an injury "might have", "may have", or "could have" caused, or "possibly did" cause the disability,—where such testimony stands alone,—is insufficient. The annotation quoted from, however, only assumes to deal with cases where the expert evidence may be necessary to establish the causal relation in a given case

"because no other evidence, sufficient in itself, is available to establish such connection". It further recognizes that there are cases where no medical or other expert evidence as to the causal connection is necessary. Thus, in the preliminary statement it is said: "*Questions as to the necessity of medical or other expert evidence* as to the causal connection between an accident or injury and subsequent illness or death *are not treated herein.*" (Italics supplied). Moreover, in the very annotation from which Appellants quote, there are eight pages (pp. 532-539 inclusive) devoted to cases where medical evidence of the *possibility of causal connection* between the injury and disability when taken *in conjunction with other evidence although slight* was considered adequate proof of causal relationship. At least 16 of the cases there cited follow that principle. The case of *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17, 20 A. (2d) 99, 135 A.L.R. 537 (1941), relied on by Appellants appears to be the only decision cited by the annotation of holding *contra.*

Similarly Appellants quote at length (Br. 26) from 32 C.J.S. p. 399 to the effect that expert testimony is to be accepted as conclusive by "the jury or other trier of facts." But the passage by its own terms refers only to situations "within the knowledge

of experts only" and to cases of "undisputed expert testimony". None of these conditions is present here. Under the law the deputy commissioner is not to be assimilated to a jury. He is presumed to have special experience and skill in the appreciation of conflicting evidence on just such issues as are here involved. In addition, the question of causation is not one exclusively within the competence of experts but turns on common sense considerations as well and the deputy commissioner is to approach it in a common sense and reasonable fashion. Finally, the medical testimony in the case at bar was not undisputed but on the contrary the testimony of the unbiased expert designated by the deputy commissioner differed from those employed and paid by the employer and its carrier.

In the case of *Contractors PNAB v. Pillsbury, deputy commissioner*, ... F. (2d) ..... (C.C.A. 9, No. 10,950), this Court on June 22, 1945 adopted the principle that causal relationship between injury and subsequent disability may be proven by conflicting medical testimony to the effect that the disability *could* have been caused in the manner found by the deputy commissioner. It is submitted that nothing in the texts or cases cited by appellant requires this Court to depart from its previous decision and the

weight of authority and to overrule that decision or distinguish its application in the case at bar.[10]

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[10] The latest reported decision on the subject, namely, *Magazine v. Shull*, 60 N.E. (2d) 611 (Ind. App., 1945), is in accord with the weight of authority that attendant facts and circumstances may be sufficient to establish causal relationship, particularly where there is medical evidence to the effect that the disability could result from the injury. There the employee sustained an internal injury while lifting, followed by pain, hemmorhages and ultimate blindness. Up to the time of the injury he never had any trouble with his eyes and his sight was good. There was medical evidence to the effect that hemorrhages could exsanguinate the retinas, followed by optic atrophy. The employer claimed that the record was devoid of proof of any causal connection between the accident and the hemorrhages. The court, however, stated that the trier of the facts may reasonably draw an inference from the "other" established facts and this is so even though the subject is a matter of scientific knowledge. The court further stated that a reasonable mind may very well infer a causal connection between the accident and the hemorrhages.

CONCLUSION

It is respectfully submitted that there was evidence before the deputy commissioner to support his finding that the employee was disabled as a result of the injury to his back and that the order of the court below dismissing the complaint was proper and should be affirmed.

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